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IN THE

Supreme Court of the United States

APRIL TERM, A. D. 1951.

No. 680

AUCKLAND HOLMES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Auckland Holmes, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decision of the Court which affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division. A petition for rehearing was denied by that Court on March 21, 1951. The petitioner was tried by the District Court without a jury and was found guilty of violating Secs. 2553(a) and 2554(a) of Title 26, USC, and Sec. 174, Title 21, USC. The judgment of the District Court was that the petitioner be sentenced to two years in the custody of the Attorney General of the United

States. A transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in compliance with Rule 38 of the Rules of this Court.

Statement of Matters Involved.

The petitioner was found guilty by the District Court of violating certain Sections of the Narcotic Laws of the United States. The indictment charged the petitioner with selling a certain quantity of heroin to a government agent. For that single act the petitioner was charged with three counts in the indictment: for (1) possessing, (2) selling, and (3) illegally importing narcotics.

The petitioner had stipulated to some of the evidence, and it is this Stipulation about which revolve most of the questions herein. The Stipulation was to the effect that if the Government were to call upon a chemist, the chemist would certify that "he opened government's exhibit I for identification and analyzed the contents therein, and found the same to be heroin * * *" (Tr. 7).

The petitioner raised the question in his Motion for a New Trial and raised the question in the appeal as to whether or not such a stipulation is sufficient to satisfy the requirements under the law.

The petitioner further raised the question whether the newly passed Opium Poppy Control Act of 1942, Sec. 188, *et. seq.*, Title 21, U. S. Code, vitiated the presumptive provisions of the Jones-Miller Act, Sec. 174, Title 21, U. S. Code. A number of other matters were raised in the petitioner's Motion for a New Trial and in his appeal to the Court of Appeals as to whether or not the Court would take judicial notice that heroin was a derivative of opium, as it was required so to do in order to sustain the conviction; and whether, by the Stipulation, the government proved the quantity to be sufficient to satisfy the

definition of a narcotic drug in accordance with Sec. 2550(a) of Title 26 U. S. Code.

Jurisdiction.

Jurisdiction of this Court is invoked under Sec. 1254, U. S. Code, Title 28. (Judiciary and Judicial Procedure, Title 28, Chap. 646, Public Law 773, 80th Congress).

The judgment of the United States Court of Appeals for the Seventh Circuit to be reviewed was entered on the 12th day of February, 1951.

Questions Presented.

1. Whether the passage of the Opium Poppy Control Act of 1942 (Sec. 188 *et. seq.* U. S. Code, Title 21) invalidated the presumptive provisions of the Jones-Miller Act, being the Export-Import Narcotic Act (Sec. 174, U. S. Code, Title 21).

2. Whether the Court was correct in taking judicial notice of the fact that heroin is a derivative of opium when there is no proof of any kind in the record.

3. Whether the quantities of heroin that were required to be proved in order to sustain a conviction under the Harrison Anti Narcotic Act (Sec. 2551(a) U. S. Code Title 26) was sufficient.

4. Whether the District Court's verdict of guilty "on both counts" was the proper verdict under an indictment which charged the petitioner under three separate counts, there being no indication in the record of any kind as to which of the counts the Trial Court was referring.

Reasons Relied On for the Allowance of the Writ.

The petitioner's appeal raises important questions of statutory construction and constitutional law which have never been but ought to be decided by the Supreme Court.

1. The Opium Poppy Control Act of 1942 (Title 21, Sec. 188 *et seq.*, U.S.C.) contains certain provisions which are repugnant to certain parts of the Jones-Miller Act (Title 21, Sec. 174 U.S.C.). Although the presumption of guilty knowledge, insofar as illegal importation of narcotics is concerned, under the Jones-Miller Act has frequently been litigated, *there has never been a case presented* to the Supreme Court since the Opium Poppy Control Act of 1942, which posed the following question: Whether or not the presumptions contained in the Jones-Miller Act have been superseded by the express provisions of the Opium Poppy Control Act. The United States Court of Appeals for the Seventh Circuit had this question raised in 1949 in the case of *U. S.* v. *Williams*, 175 F. (2) 715, but chose to ignore the question for the reason that the case could be decided on other grounds. The instant case therefore is the first time the issue presented before this Court was met by any Court of Appeals, which decision of the Court of Appeals was contrary to the petitioner's position; but which nonetheless was decided for the first time in any Court in the instant case.

2. The decision of the Court of Appeals to the effect that heroin is a derivative of opium, and that the court would take judicial notice thereof, loses sight of the decisions in the lower courts to the contrary. There has been no clear-cut decision by this Court on the point. The only United States Supreme Court case touching on the point is *U. S.* v. *Jim Fuey Moy*, 241 U. S. 394, wherein the Court stated that it could *not* take judicial notice that no opium is produced in the United States.

3. The decision of the Court of Appeals for the Seventh Circuit in deciding contrary to the petitioner's position that the government did not prove the heroin in question was not a sufficient quantity to prove a violation

of the Act, relied on matters completely outside of the record, as is indicated when the Court of Appeals was unsure of its position, because it stated "We think it was stipulated in effect that Exhibit 1 contained 112 grains of heroin". (Tr. 63.) The Court of Appeals relied *on an argument of counsel for the government* in support of its contention, notwithstanding that there was no proof in the record as to the amount involved, the Harrison Anti-Narcotic Act exempting the possession of certain minimal quantities of narcotics from being violative of the Act. (Title 26, Sec. 2251(a), U.S.C.)

4. The decision of the Court of Appeals in sustaining the verdict of the District Court of Guilty on "both counts" is violative of the Rules with respect to the verdicts and findings on each of the counts of an indictment.

Wherefore, the petitioner prays that the Writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court on a date to be designated, a full and complete Transcript of the Record and all proceedings had in this cause, numbered on its docket 10204, to the end that this cause may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Seventh Circuit be reversed by this Court, and that your petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Counsel for petitioner

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SUPREME COURT OF THE UNITED STATES
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No. .....

AUCKLAND HOLMES,
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UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States Court of Appeals for the Seventh Circuit in this cause, No. 10204, is reported in *United States* v. *Auckland Holmes,* decided on February 12, 1951.

The opinion in this case appears at pp. 60 to 66 inclusive, of the Record filed herein.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254, Title 28, U. S. Code (Judiciary and Judicial Procedure). The judgment of the Court of Appeals was entered and the opinion filed on February 12, 1951. The Court denied a petition for rehearing on March 21, 1951.

Specification of Errors.

The Court of Appeals erred in ruling contrary to the petitioner on each of the issues set forth in the Petition.

Statement of the Case.

The petitioner was indicted on three counts charging him with the possession of heroin in violation of Section 2553(a) of Title 26 U. S. Code; the sale of heroin in violation of Section 2554(a) of Title 26 U. S. Code; and with the unlawful importation of heroin in violation of Section 174, Title 21 U.S. Code. The purchase, sale and importation all arise out of one transaction to a federal agent on September 14, 1949. The case was heard by the District Court without a jury, at the conclusion of which the Court entered a "Finding of Guilty on Both Counts". (Tr. 44.)

Two of the issues on this appeal arise out of the stipulation of evidence in the trial of the cause with respect to the identity of the alleged contraband in question. The only evidence in the record with respect to the identification of the narcotic is as follows: He (the chemist) "analyzed the contents therein (government's Exhibit 1) and found the same to be heroin". (Tr. 6.) The Court of Appeals' interpretation of this bald stipulation was as follows: "We think it was stipulated in effect that Exhibit 1 contained 112 grains of heroin". (See Opinion, Tr. 63).

ARGUMENT.

I.

The passage of the Opium Poppy Control Act of 1942 invalidated the presumptive provisions of the Jones-Miller Act.

The petitioner was charged with violating Section 174, Title 21, of the United States Code, which section prohibits the importation into the United States of a narcotic drug, knowing the same having been imported contrary to law; and, whenever a defendant is shown to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize a conviction. Before the passage of the Opium Poppy Control Act of 1942, (Sec. 188, *et. seq.,* Title 26, United States Code) the question of the Constitutionality of the presumptive features of the Importation Act was decided by this Court in favor of such presumption. *However, all of the decided cases pre-date 1942 upon this question.* The reasoning behind upholding of the validity of the presumptive feature was the recognition that opium could not be and was not grown in the United States. The Opium Poppy Control Act of 1942 effectively alters the position of the Courts by recognizing the actual fact to be that opium can be and is produced in the United States in varying quantities.

The Court of Appeals for the 7th Circuit had the same question posed to it in the case of *United States* v. *Williams,* 175 F. (2) 715 (1949). In that case, the defendant argued that a conviction under Section 174 could not stand where the only proof was possession of the narcotic, in view of the passage of the Opium Poppy Control Act

of 1942, on the grounds that by those sections it was finally admitted by the Congress that opium could be, was, and is grown in the United States in varying quantities. There may have been a reason for the presumption of the original passage of the Export-Import Act, which reason was that opium could not be grown in the United States. That reason not only does not square with scientific and botanical facts today, but it does not even exist legally as fiction in the light of the Act of 1942. Even before recognition that the opium poppy plant is capable of being produced in large quantities in this country, there was recognition amongst the scientists and botanists that opium could be produced in the United States. The United States Dispensatory, 23rd Edition, was correct scientifically (but wrong economically) when it stated on page 783:

> "Attempts have been made in the United States to produce opium from the poppy, *but although it is possible to obtain the product,* commercial success has not been * * * achieved because of the cost of labor." (emphasis added.)

In the recent cases of *Stutz, et al* v. *Bureau of Narcotics,* and *Schwein, et al* v. *Bureau of Narcotics,* 56 F. Supp. 810, a number of botanical growers of the opium poppy in the State of California were seeking licenses to produce the poppy, apparently willing to take their chances that the cost of labor would not prevent the successful commercial marketing of the opium poppy and its products. In addition, the fact of the actuality of the growth of opium poppy in the United States was recognized by Justice Holmes in the *United States* v. *Jim Fuey Moy* case, 241 U. S. 398 (1916) wherein it was stated that:

> "If we could know judicially that no opium is produced in the United States the difficulties in this case

would be less, but we hardly are warranted in that assumption when the Act itself purports to deal with those who produce it. Sec. 1. Congress, at all events, contemplated production in the United States, and therefore the Act must be construed on the hypothesis that it takes place. If opium is produced in any of the states, obviously the gravest question of power will be raised by an attempt of Congress to make possession of such opium a crime. *U. S.* v. *DeWitt*, 9 Wall. 41 * * *"

The Government, in the *U. S.* v. *Williams* case, evaded the point, but contended that the conviction in that case was based on possession of cocaine as well as the possession of heroin, and that therefore the argument ought not to obtain. The government stated:

"It is not thought necessary to dwell on the question, for the reason that the conviction being appealed from is based on possession of heroin, a derivative of opium, and cocaine, which is a derivative of coca leaves. It is not contended by appellant that coca leaves are grown in the United States, and as the Opium Poppy Control Act of 1942 applies only to opium it can have no bearing whatever upon the presumption imposed in Sec. 174, Title 21, United States Code, as to coca leaves and derivatives." (p. 7 Brief of Govt. in *U. S.* v. *Williams*, No. 9733, U.S.C.A. 7th.)

The Court adopted the argument of the government and did not answer the question posed in the *Williams* case and posed again in the instant case. The Court stated on p. 716 that:

"The defendant contends that the Opium Poppy Control Act of 1942, 21 U.S.C.A., Sec. 188 et seq., invalidated the provision in this statute that unexplained possession of the narcotic drugs shall be deemed sufficient to authorize conviction. *Whatever the merits of this contention as to conviction based on*

> *possession of opium or its derivatives,* it is a sufficient answer that the conviction appealed from is based on the possession of cocaine, a derivative of coca leaves, as well as on the possession of heroin, which is a derivative of opium. It obviously cannot affect this provision as it relates to the possession of cocaine." (Emphasis added.)

The Court of Appeals for the 7th Circuit in passing on this point, when the question was squarely raised in the instant appeal, stated that "a construction that a statute has been repealed by implication is one that should be rarely indulged in, and should, in any event, have only a very limited application." (Tr. 62.) We believe that the Court of Appeals' reasoning loses sight of the very salient fact that the judicial reasons for the upholding of the Constitutionality of the presumptive features of the Export-Import Act was the fact that no opium was produced in the United States, and that, therefore, anyone in the possession of opium or its derivatives must have imported the same. This judicial fiction is now exploded by it by the actual fact of its growth in the United States and by the Congressional law, which indicates that opium can be grown and is grown in the United States.

We respectfully submit to this Court that it ought to take jurisdiction of the case to pass upon this very important point, which has never been raised before by the Supreme Court of the United States and which has been passed upon only by the Court of Appeals for the 7th Circuit in the instant case. There are an increasing number of prosecutions as a result of the various narcotic laws, and we respectfully submit that a decision on this point by the Supreme Court is necessary for the guidance of the Government in its future prosecutions.

We believe the rule of law to be that inferences and presumptions are not favored, but where they have been

upheld, there have been reasonable basis for the existence of the presumption. *Such basis no longer exists in that it cannot be presumed* conclusively any longer that opium cannot be produced in the United States. To the contrary, it is recognized both by the Congress and by the Courts that opium can be and is produced in varying quantities in the United States. Fictional facts make bad law, and where the fact is entirely exploded, or is contrary to recognized and admitted facts, then the law ought to meet the situation.

We respectfully submit, therefore, that because there is no proof whatsoever that the defendant either himself imported opium or its derivatives, or that he knew that the same were imported contrary to law, that it was erroneous for the District Court to find the defendant guilty and that it was further error on the part of the Court of Appeals to affirm the conviction.

II.

The Government did not prove heroin to be a derivative of opium. There is no Supreme Court decision on this point.

The Government also failed to prove that heroin is a derivative of opium. It alleged so, in the indictment, in all three counts, but again in its stipulation it failed to include the opinion of the chemist, if such would be his opinion, that heroin is a derivative of opium. The Government failing in this instance to adduce the necessary proof, is requiring the Court to go outside the record again in order to sustain the conviction. It will require the Court to engage in speculation as to whether or not heroin is a derivative of opium as is contemplated in the two Acts. When we consider how the Courts have been in confusion and in differences of opinion with respect to whether or not they ought to take judicial notice that

opium is grown or can be grown in the United States, we ought to give pause before we create another assumption in this case in order to bolster the conviction. In the case of the *U. S.* v. *Jim Fuey Moy,* 241 U. S. 394, the Court stated that it could not take judicial notice that no opium is produced in the United States. Notwithstanding that, other Courts have stated that they will take judicial notice that opium cannot be produced in the United States. Under Point I of this Argument we have shown that the previous "fact" of which Courts took judicial notice, is no longer a "fact" of which they may take judicial notice.

With respect to derivatives of opium, there has been a similar difference of opinion amongst the Courts. So far as this counsel knows, there is no Supreme Court decision on the question. Although the case of *Hughes* v. *U. S.,* 253 F. 543, states that the Court would take judicial notice that morphine and heroin are derivatives of opium, the case of *U. S.* v. *Hammers,* 241 F. 542, is directly contrary, in that there the Court stated that it will not take judicial notice of what are derivatives of opium, but required proof thereof. The Court there stated on p. 543:

> "Sec. 1 of * * * the Harrison Anti-Narcotic Act, provides that dealers, etc. in 'opium or coca leaves, or any component, manufacture, salt, derivative or preparation thereof, shall register, etc.' The indictments in question nowhere allege that the cocaine, morphine sulphate or morphine is opium or coca leaves, or any compound, manufacture, salt or derivative or preparation of opium or coca leaves. It is therefore to be decided whether the Court will take judicial cognizance of the fact that cocaine is a compound, salt, derivative, manufacture or preparation of coca leaves, and morphine sulphate and morphine a compound, salt, derivative or preparation of

opium. If the Court will take judicial cognizance of these facts, the indictments need not allege them, and they need not be proven on the trial. If it is required to prove the fact on the trial it seems to me that then the allegation should be contained in the indictment; otherwise the allegation and probata would not correspond. * * *

"* * * But it was held in the cases that proof must be adduced to show that the article charged to have been sold was included in the doings prohibited in the statute, and if such as is the case then the Court cannot take judicial notice that cocaine is a manufacture, salt, derivative or compound of coca leaves. The same may be said as to morphine sulphate and morphine.

"The Congress in passing this Act specifically names opium or coca leaves, and then to cover the ground fully proceeds with 'or any compound, manufacture, salt, derivative, or preparation thereof.' *Under the Rules of Criminal Pleading, requiring that the defendant shall be informed of the charge to be met, it seems to me that the indictment, to comply with this rule, in cases where the charge is not selling opium or coca leaves, should state that the article sold was either a compound, salt, derivative or manufacture or preparation of either opium or coca leaves; that when so stated it becomes a matter of proof to be submitted to the jury, and unless so stated the indictment is defective in substance, and not form merely.*" (Emphasis added.)

In the instant case it will be observed that the government on each count *made the allegation* that heroin was a derivative of opium (Tr. 3 and 4); but again *totally failed* when they had the opportunity to prove that heroin is a derivative of opium. We submit that it is a dangerous procedure for the Courts to substitute in every instance inferences, presumptions, inferences upon presumptions, judicial notice, etc., in order to sustain a

case. The Government is then throwing the burden upon the Court and asking the Court to strain its power and its knowledge in order to do what the Government should have attempted to do in the trial, and that is, to produce proof adequate in the record. It is asking the Court too much. At what point will the Court know where to draw the line of judicial notice when the whole subject of judicial notice is difficult of ascertainment? This is a criminal statute which is being applied, and the defendant is faced with two years imprisonment! The deprivation of liberty in this Anglo-Saxon society and system of jurisprudence is a matter of great seriousness, to be exercised only when proof is clear, convincing, and beyond a reasonable doubt.

If the Court were to take judicial notice that heroin is a derivative of opium, will it also take judicial notice that morphine sulphate and morphine hydrochloride are the same? In the case of *Guilbeau* v. *United States*, 288 F. 731, the defendant was found guilty by the Trial Court of an unlawful sale of certain derivatives and salts of opium, to-wit, "4 grains of morphine sulphate". The evidence showed a sale by her of 4 grains of morphine hydrochloride. The Court reversed the conviction and stated on p. 732 that

> "*According to the evidence,* morphine sulphate is a compound which contains morphine and sulphuric acid, while morphine hydrochloride is a compound which contains morphine and a radical combined with a chloride * * *" (emphasis added.)

The Court reversed the conviction because there was a variance between the indictment and the proof, *notwithstanding that the proof showed that the defendant sold morphine,* although it was morphine hydrochloride.

Is novocaine a derivative of cocaine? The Attorney General of the United States would say yes. See his

opinion in Vol. 36, *Opinions of Attorneys General,* pp. 258-270 (1930). There the Attorney General gave his opinion to the Secretary of the Treasury that, notwithstanding that tropocacaine hydrochloride could be proved to be a derivative of coal tar or some other substance, in his opinion the legal fiction must be obtained because it is possible also that the same substance can be derived from cocaine. However, the Court of Appeals came to a different conclusion in the case of *Lowe* v. *Farbwerke-Hoechst Co.,* 240 F. 671 (CCA 2nd, 1917) *where on the proof* the Court held that, notwithstanding that the drug novocaine was a habit-forming drug, it did derive from coal tar and was a coal tar product.

We can therefore see the confusion which obtains from requiring the Courts to substitute judicial notice for the judgment of qualified chemists and scientists. Are the following derivatives of opium: Dihydrocodeinone, Bitartrate, Dihydromorphinone Hydrochloride, Methadon Hydrochloride, Meperidine Hydrochloride, Hycodan, Dilaudid, Adanon, Demerol? They may be, but should not the Court have the assistance of properly qualified chemists to make the determination?

We respectfully submit that the Government ought to be required to make its proof at the proper time and to submit its evidence in accordance with the rules of law and the rules of evidence; and not require the Court to strain the system of both procedural and substantive law in order to sustain a conviction. We respectfully submit that because there is no proof in the record that heroin is a derivative of opium, *as alleged in the indictment,* the judgment of the Trial Court and the decision of the Court of Appeals affirming the same ought to be reversed.

III.

The Government did not prove the heroin was in sufficient quantity to take it under the Act.

The indictment charged in three separate counts that the defendant (1) imported, (2) purchased, (3) sold "a quantity of a certain derivative of opium, to-wit, 112 grains of heroin". (Tr. 3 and 4.)

We have objections to the proof—or rather the lack of proof—adduced to sustain these allegations in the indictment. The government *alleged* that the defendant possessed and sold 112 grains of heroin. However, what did it prove? It proved that upon a chemical analysis that the substance analyzed was heroin (Tr. 7). *Not a word,* even though this is the Government's own wording of the Stipulation, as to whether the quantity contained was 112 grains, 1 grain, ⅛ grain, 1/100 grain, or any quantity. This, too, the Government omitted, even though sub-chapter A of chapter 23 of Title 26 of the United States Code specifically exempts certain minimal quantities of various narcotics from being subject to the provisions of the Act. Sections 2553(a) and 2554(a) of Title 26 are sections under sub-chapter A of chapter 23 of the Harrison Anti-Narcotic Act. Section 2551(a) of the said Act reads as follows:

> "'The provisions of this sub-chapter * * * shall not be construed to apply to the manufacture, *sale,* distribution, giving away, dispensing, or *possession,* of preparations and remedies which do not contain more than 2 grains of opium, or more than ¼ grain of morphine, or more than ⅛ of a grain of heroin, * * *" (emphasis added.)

It is not clear from the evidence on the record before this Court exactly what the defendant was supposed to have purchased and was supposed to have been sold. We

refer again to pp. 6 and 7 of the Transcript, where the only record exists of the *corpus* of the alleged crime. It there appears that in the Stipulation, if the chemist were to testify he would testify that "he opened government's Exhibit 1 for identification and analyzed the contents therein and found the same to be heroin, which is now sealed in government's Exhibit 1-A for identification * * *" Nothing more! The indictment stated that the defendant was possessed of and did sell 12 grains of heroin. We will admit that if the government were to prove any quantity of the substance less than that alleged in the indictment, but more than that required by the exemption, that there would be sufficient proof to sustain the allegation in the indictment in that single instance. **But here there is no proof at all as to what the quantity is, and the Court again is left to guess and to fill in the missing places.**

In the case of *Chin Gum* v. *U. S.*, 149 F. (2) 575, the Court had before it a similar question. There the proof was made that the defendant was found with a quantity of *smoking opium* and the defendant attempted to point out that there was no quantitative determination of the amount of smoking opium. The Court agreed that the contention was well taken insofar as it went, in that the exemptions listed under Sec. 2551 of Title 26 did obtain. However, the Court stated that it would take notice that smoking opium is not used for medicinal purposes or preparations, and that therefore the conviction was sustained.

However, in the instant case the substance under consideration is heroin which is a product used in countless numbers of medicinal preparations in varying degrees and in varying quantities.

The complete failure of the Government to develop all

of the proof necessary is absolutely fatal to its prosecution. It may not have been too difficult a task for the Government but we submit that it is a salient and a vital omission. As the Court of Appeals has stated recently when it reversed a conviction charging violation of the narcotic laws because no venue was proved,

> "Surely, the defendant does not have to lead the government through the various steps of the trial to insure a proper record for the government to stand upon". *U. S.* v. *Jones,* 174 F. (2) 746 at 749.

The Court of Appeals in answer to this question stated, contrary to the record in the case, that "we think it was stipulated in effect that Exhibit 1 contained 112 grains of heroin." (Tr. 63.)

We respectfully submit that the Court of Appeals was straining the record to justify this conclusion because the only justification for this statement is included in the Opinion of the Court of Appeals to the following effect:

> "UPON ENQUIRY BY THE JUDGE DURING THE TRIAL AS TO THE AMOUNT OF HEROIN CONTAINED IN EXHIBIT I, GOVERNMENT COUNSEL INFORMED HIM THE AMOUNT WAS 112 GRAINS AND AGAIN BEFORE SENTENCE WHEN THE COURT ASKED WHETHER THE AMOUNT WAS 112 GRAINS, GOVERNMENT COUNSEL ANSWERED 112 GRAINS, ONE-FOURTH OUNCE." (Tr. 61) (Emphasis added)

We submit that it is a novel and unique theory of the law that argument by either one of the counsel or a colloquy between the Trial Court and counsel can be treated as valid evidence.

We respectfully submit that there is nothing in the entire record which would justify that there is any evidence

either in the Stipulation or from the witness stand to indicate what the quantity of heroin was; and we respectfully submit that by this back-door justification, the Court of Appeals was supplying the evidence which was fatally lacking at the trial of the cause.

We respectfully submit, therefore, that the decision of the Court of Appeals on this score ought not to be suffered to stand.

IV.

The decision of the Court of Appeals in sustaining the Trial Court's verdict of guilty on both counts sustains an improper verdict under the indictment.

In addition to all the other errors and omissions in the records as previously pointed out, the finding of guilty by the Trial Court is an incorrect finding. Notwithstanding that there were three counts in the indictment, and notwithstanding that each of the counts required an especial kind of proof, which we have previously submitted was failing in every instance, the Court stated "There will be a finding of guilty on both counts". (Tr. 44.) The Government counsel attempted to correct the Court, and the following colloquy ensued:

> "Mr. Piragine: There are three counts. The first count is as to possession of heroin. The penalty is $2,000 and/or five years; the second count is the sale, carrying the same penalty; the third count is the concealment and facilitating the transportation, which is $5,000 and/or ten years, or both. That is the third count.
>
> The Court: What was that first count?
>
> Mr. Piragine: The first count is the possession of heroin, not in or from the original or stamped package; the penalty is $2,000 and or five years, or both.

The second count is the sale count, selling; it carries the same penalty of $5,000 or five years, or both.

The third count is the concealment and facilitating the transportation after importation." (Tr. 44.)

However, the Court did not at that time change its finding of guilty, nor did it indicate upon which counts the defendant was found guilty. When next the defendant appeared before the Court for sentencing, the Court was only interested in whether or not the defendant had cooperated with the Government, notwithstanding that the defendant denied throughout the trial that he possessed or sold any narcotics. It nowhere appears in the Transcript on pp. 44, 45, or 46, that the finding of guilty was altered or modified in the presence of the defendant or in the presence of his counsel. The defendant was sentenced to two years in the custody of the Attorney General.

It is true that if there is sufficient proof to sustain any one count of an indictment, and the sentence upon a finding of guilty of two or more counts is less than the maximum which could be imposed on one count, then the judgment would be valid. However, in this instance it is our contention not only that there is insufficient proof on each of the counts *but that the finding of guilty* on *"both counts"* is an invalid finding. The finding in a criminal case ought to be certain and clear and leave no room for doubt or question. When this error by the Court is compounded upon the omissions and failure properly to present sufficient evidence on the part of the Government, we believe that it is clearly shown that the trial proceeded and ended under handicaps.

In the case of *Goode* v. *U. S.*, 12 F (2) 742 (CCA-8th) the Court stated that if the sentence of imprisonment is ambiguous and indefinite as to which count of the Inform-

ation it should be applied to, it is not good as to either, and it need not specifically and conclusively appear that the imprisonment was imposed on the wrong count.

Where there are separate counts in an indictment there must be a separate verdict as to the guilt or innocence of the defendant on each of the counts, if the judgment of conviction is to stand where there is an error in the record affecting one or more of the counts. *U. S.* v. *Di Matteo,* 169 F. (2) 798; also *U. S.* v. *Crescent-Kelvan Co.,* 164 F. (2) 582.

It may be argued by the Government that there appears on p. 47 of the Transcript a written order of the Court finding the defendant guilty as charged in the indictment. However, we would like to point out to this Court that the original Transcript of Proceedings before the Trial Court does not contain any such finding, nor, as is observed from p. 47 of the Transcript of Record, did such finding take place in the presence of the defendant, because it will be observed on p. 46 of the Transcript of Record that the official court reporter ends his certification on that page. *If there was an attempt to correct the record it was done outside the presence of the defendant and outside the presence of his counsel.* Rule 43 of the Federal Rules of Criminal Procedure provides that

> "the defendant shall be present at the arraignment, at every stage of the trial, including the impanelling of the jury and the *return of the verdict,* and at the imposition of sentence, except as otherwise provided by these rules * * *"

It is respectfully submitted that on the Record and in the official Transcript of Proceedings from which the Transcript of Record was made, that the order which appears on p. 47 of the Transcript was not made in the presence of the defendant or of his counsel; and that the

first time such order was discovered as entered in the official files was after the Notice of Appeal was filed and when counsel was making up the Designation of Record. At that time such an order in writing was discovered in the files. It is to be observed, however, that even this order, as appears on p. 47 of the Transcript of Record, *does not show that the Court signed the order,* for it nowhere appears that the Trial Court's name is on said order.

CONCLUSION.

We respectfully submit that because several points are raised upon this appeal, which have never been decided by the Supreme Court and because the Court of Appeals was caused to go outside the Record to justify the upholding of the verdict of the Trial Court, that this case requires that this Court grant a Writ of Certiorari to the Court of Appeals for the 7th Circuit, and upon hearing of the issues, make its decision known.

Respectfully submitted,

JULIUS LUCIUS ECHELES,
Attorney for Petitioner.

Chicago, Illinois.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 680

AUCKLAND HOLMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 60-65) is reported at 187 F. 2d 222.

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1951 (R. 66), and a petition for rehearing (R. 69-72) was denied on March 21, 1951 (R. 73). The petition for a writ of certiorari was filed on April 18, 1951. The jurisdiction of this Court is invoked under 28 U.S.C.

1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the Opium Poppy Control Act of 1942, providing for licensing of opium poppy growers in the United States, repealed by implication 21 U.S.C. 174, providing that possession of prohibited narcotic drugs is sufficient evidence for conviction unless the accused explains the possession to the satisfaction of the jury.

2. Whether the court could take judicial notice of the fact that heroin is a derivative of opium.

3. Whether there was proof that the petitioner sold and possessed a sufficient amount of heroin to warrant his conviction for violation of the narcotics laws.

4. Whether the court made a valid general finding of guilty to support the sentence imposed upon petitioner.

STATUTES INVOLVED

21 U.S.C. 174:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be

fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U.S.C. 2553(a):

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

26 U.S.C. 2554(a):

It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

STATEMENT

After a trial before the court without a jury (R. 5), petitioner was convicted and given a general sentence of two years' imprisonment under an indictment in three counts (R. 3-4) charging (1) the unlawful purchase, on September 14, 1949, in Chicago, Illinois, from a person or persons unknown, of 112 grains of heroin, a derivative of opium, not in or from the original stamped packages, in violation of 26 U.S.C. 2553(a) [*supra,* p. 3]; (2) the unlawful sale for $100.00 of this heroin at the same time and place to one Richards, not in pursuance of a written order from the said Richards on a form issued in blank for that purpose by the Secretary of the Treasury, in violation of 26 U.S.C. 2554(a) [*supra,* p. 3]; (3) the fraudulent receipt and concealment of this heroin after its importation into the United States, knowing the same to have been imported contrary to law, in violation of 21 U.S.C. 174 (*supra,* p. 2). After the overruling of petitioner's motion for a new trial (R. 48-49), on appeal (R. 50-52) the conviction was affirmed by the Court of Appeals (R. 66) under counts 2 and 3.

The evidence on behalf of the Government, which was given by two federal narcotic agents, Richards and Fields, may be summarized as follows:

On September 14, 1949, in Chicago, Illinois, Fields followed Richards to 47th and South Parkway to meet a drug addict known as "Red," who was to assist in the apprehension of petitioner as a

suspected narcotics law violator (R. 7, 12, 19). With Fields keeping them under surveillance, Richards and "Red" proceeded to petitioner's apartment at about 10:00 a.m. (R. 8, 14, 19). After "Red" informed Richards that petitioner, who was introduced as Cornelius, "was the man from whom [he] was to purchase the quarter ounce of heroin for the sum of $100," Richards gave "Red" $100 in unmarked money which the latter handed to petitioner (R. 8-9, 13-15, 16, 22). Petitioner told Richards he would have to call his "connection" and he then made a telephone call. At about 11:00 a.m., his telephone having rung, he spoke to some unknown person. Petitioner told Richards and "Red" to go to a tavern on 44th and Cottage Grove where he would meet Richards with the narcotics. Since petitioner stated that his car was in the garage, Richards and "Red" walked to the tavern, being followed by Fields. (R. 9, 15-17, 19.) Richards testified that it was about 11:05 a.m. when they arrived at the tavern, and that they waited about fifteen or twenty minutes until petitioner arrived in a taxi (R. 9, 17, 19). Upon petitioner's nodding to Richards, the latter followed him into the men's room, where petitioner handed him a small cellophane wrapped package. Answering Richards' promise that if this "stuff" was any good he would get in touch with him, petitioner gave the assurance that it was "o.k." (R. 9, 17). No arrest or search of the petitioner was made at the time (R. 18).

Subsequently Fields and Richards both initialed and dated the package containing the heroin, and Fields turned it over on the same day for anaylsis by the government chemist (R. 9-11, 20). Before the first witness was called, an oral stipulation between Assistant United States Attorney Piragine and defense counsel Weller as to the contents of the package sold by petitioner to Richards had been incorporated into the record as follows (R. 6-7):

> Mr. PIRAGINE: Your Honor, before calling the first witness, it has been stipulated by the United States of America and counsel for defendant that if Davis C. Elliott, United States Chemist employed by the Government, were called upon to testify he would testify that he received a package, made a chemical analysis of same——
>
> The COURT: Give it a number.
>
> Mr. PIRAGINE: Mark this Government's Exhibit 1. I am not opening it. I have two of them.
>
> Mark this Government's Exhibit 1, and this 1-A.
>
> (Said exhibits were marked Government's Exhibits 1 and 1-A, respectively, for identification.)
>
> Mr. PIRAGINE: And if he were called upon to testify he would testify Government's Exhibit 1 for identification was delivered to him by Agent J. T. Fields of the Narcotics Bureau on September 14, 1949, with the contents therein; that he opened Government's Exhibit 1 for identification, and analyzed the contents

therein, and found the same to be heroin, which is now sealed in Government's Exhibit 1-A for identification; that he would further testify that Government's Exhibits 1 and 1-A have since September 14, 1949 been in his possession until this morning, when turned over to Narcotic Agent James T. Fields.

The COURT: Is that the stipulation of the parties?

Mr. WELLER: Yes, sir.

The COURT: Very well. You may proceed.

At the end of Richards' direct examination, Government Exhibits 1 and 1-A were introduced in evidence, petitioner's counsel expressly stating that he had no objection. Richards testified that this package containing the heroin did not have any tax stamps on it at the time he purchased it from petitioner, and that it was in the same condition at the time of the trial as it was at the time of the sale with the exception of the initials on it (R. 11).

On June 26, 1950, after all of the testimony had been taken and the trial court had heard oral argument by counsel on both sides, the following occurred (R. 44):

The COURT: There are something like 100 grains of heroin there?

Mr. PIRAGINE [Assistant United States Attorney]: 112, your Honor.

The COURT: I can see no reason for disbelieving the testimony of the government agents. I see every reason in the world why the defendant would have testified falsely.

There will be a finding of guilty on both counts. Bond will be revoked, and I will fix sentence tomorrow morning.

What is the penalty?

Thereupon the government attorney told the court that there were three counts instead of two and explained the possible penalties under them. The court, after being informed that there had been no cooperation between petitioner and the Government, did not change the form of its finding, but said: "I will wait until about Thursday to fix sentence. I want to think it over a little bit. Thursday morning at 10 o'clock. In the meantime, remand him to the custody of the Marshal, cancel bond, to remain in custody until Thursday morning at 10 o'clock at which time I will fix sentence" (R. 44). In its written order, also dated June 26, 1950, making this ruling effective, the court stated *inter alia* that it "finds the defendant guilty as charged in the Indictment" (R. 47), without reference to separate findings upon each of the three counts.

At the hearing before sentencing on June 29, 1950, this colloquy occurred (R. 45-46):

The Court: This is a heroin case?

Mr. Piragine: Yes, 112 grains, one-quarter ounce.

The Court: Have you anything to say why I shouldn't put you away?

Defendant Holmes: Your Honor, I still—

didn't sell that agent or give or receive any money from him at no time.

The Court: All right. You may have two years in the custody of the Attorney General.

The judgment sentencing petitioner reads as follows (R. 49-50):

> This day comes the United States by the United States Attorney comes also the defendant Auckland Holmes in his own proper person and by his counsel to have the sentence and judgment of the Court pronounced upon him, the Court having heretofore found him guilty as charged in the Indictment filed herein against him, and the defendant being asked by the Court if he has anything to say why the sentence and judgment of the Court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not now be pronounced it is therefore
>
> Considered and Ordered by the Court and is the sentence and judgment of the Court upon the finding of guilty, as aforesaid, that the defendant Auckland Holmes be committed to the custody of the Attorney General of the United States or his duly authorized representative for and during a period of Two Years.
>
> ELWYN R. SHAW,
> *United States District Judge.*
>
> Dated: June 29, 1950.

ARGUMENT

1. There is no merit in petitioner's contention that the passage of the Opium Poppy Control Act

of 1942 [21 U.S.C. 188a-n] invalidates the presumption of guilt under 21 U.S.C. 174 (*supra*, p. 2) by reason of unexplained possession of prohibited narcotics [1] (Pet. 9-13). The constitutionality of this presumption arising from possession was conclusively established by this Court in *Yee Hem* v. *United States*, 268 U.S. 178, 184, where the Court, speaking through Mr. Justice Sutherland, held:

> We think it is not an illogical inference that opium, found in this country more than four years (in the present case, more than fourteen years) after its importation had been prohibited, was unlawfully imported. Nor do we think the further provision, that possession of such opium in the absence of a satisfactory explanation shall create a presumption of guilt, is "so unreasonable as to be a purely arbitrary mandate." By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, "since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the

[1] As the court below pointed out (R. 62), this question, so far as it related to a conviction for the possession of opium or one of its derivatives, was not decided in *United States* v. *Williams*, 175 F. 2d 715, 716 (C.A. 7), the decision there involving a conviction based upon the possession of cocaine, a derivative of coca leaves.

> facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it," is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress.

For other cases upholding the constitutionality of the presumption arising under 21 U.S.C. 174, see *Stein* v. *United States,* 166 F. 2d 851, 855 (C.A. 9), certiorari denied, 334 U.S. 844; *Gonzales* v. *United States,* 162 F. 2d 870, 871 (C.A. 9); *United States* v. *Moe Liss,* 105 F. 2d 144, 146 (C.A. 2); *Mullaney* v. *United States,* 82 F. 2d 638, 639 (C.A. 9); *Rosenberg* v. *United States,* 13 F. 2d 369, 370 (C.A. 9); *Charley Toy* v. *United States,* 266 Fed. 326, 329-330 (C.A. 2), certiorari denied, 254 U.S. 639.

Petitioner contends that, prior to the Opium Poppy Control Act of 1942, it was recognized that opium could not be and was not grown in the United States, so that anyone possessing it must have imported it, and that this was the reason for the courts' upholding the validity of the presumption under 21 U.S.C. 174 (Pet. 9-12). However, even before the *Yee Hem* case, *supra,* was decided in 1925, this Court in 1916 held through Mr. Justice Holmes that it could not take judicial notice that no opium was produced in the United States. *United States* v. *Jin Fuey Moy,* 241 U.S. 394, 401. Thus, even when the *Yee Hem* case was decided, this Court was aware that there may have been some production of opium in the United States, but nevertheless upheld

the constitutionality of the presumption. The fact that there may have been sporadic production of opium in the United States prior to the enactment of the 1942 Act did not destroy the statutory presumption under 21 U.S.C. 174. Neither does the fact that now under the 1942 Act it is possible to obtain a license [2] to grow opium poppies in the United States destroy it. The passage of the 1942 Act has not resulted in any appreciable increase in the production, if any, of opium in the United States, so that it cannot be said that a person possessing it may be likely to have opium produced in the United States rather than a product imported from abroad. In fact, as the court below noted, "We have been informed that a license [under the 1942 Act] has never been issued" (R. 62). This is corroborated by the "Annual Report of the Secretary of the Treasury, 1949-1950," p. 115, wherein it is stated:

> The Bureau of Narcotics is charged with the investigation, detection, and prevention of violations of * * * the Opium Poppy Control Act of 1942 (56 Stat. 1045) * * * It * * * has authority to issue licenses for the production of opium poppies to meet the medical needs of the country *if and when such pro-*

[2] 21 U.S.C. 188b: "It shall be unlawful for any person who is not the holder of a license authorizing him to produce the opium poppy, duly issued to him by the Secretary of the Treasury in accordance with the provisions of sections 188-188n of this title, to produce or attempt to produce the opium poppy, or to permit the production of the opium poppy in or upon any place owned, occupied, used, or controlled by him."

duction should be found in the public interest." [Emphasis added.]

The mere passage of the Opium Poppy Control Act has thus not caused any change of condition which would affect the reasonableness of the statutory presumption.

The court below was correct in deciding that it would not be "justified in construing the presumption provision of the Jones-Miller Act [21 U.S.C. 174] invalid by implication" (R. 62). This was in accordance with the well-established principle that "repeals by implication are not favored." *Federal Trade Commission* v. *A.P.W. Paper Co.,* 328 U.S. 193, 202; *U.S. Alkali Ass'n* v. *United States,* 325 U.S. 196, 209-210.

2. Contrary to petitioner's contention (Pet. 13-17), the court could take judicial notice of the fact that heroin is a derivative of opium, as had been alleged in the indictment. Heroin is a very common and widely known drug, and there is nothing unusual about a court taking judicial notice of the fact that it is a derivative of opium.[3] As the court stated in *Hughes* v. *United States,* 253 Fed. 543, 545 (C.A. 8), certiorari denied, 249 U. S. 610, in holding that it could take judicial notice that morphine, heroin, and cocaine are derivatives of opium and coca leaves, "In a sense the question is one of the definition or meaning of words long in common

[3] Whether a court should take judicial notice that a long list of unfamiliar drugs (see Pet. 17) are derivatives of opium is entirely irrelevant here.

use, about which there is no obscurity, controversy, or dispute, and of which the imperfectly informed can gain complete knowledge by resort to dictionaries within reach of everybody." See also in accord *James* v. *United States,* 61 F. 2d 912 (C.A. 5), certiorari denied, 288 U.S. 613; *Greenberg* v. *United States,* 285 Fed. 865, 867 (C.A. 8), petition dismissed, 263 U.S. 728; *Ryan* v. *United States,* 283 Fed. 975, 976 (C.A. 8), petition dismissed, 263 U.S. 727.[4]

Petitioner does not deny the commonly known fact that heroin is a derivative of opium, and does not show how the court's taking judicial notice of this fact misled him to his prejudice. The indictment charged that the drug involved was heroin, and it was undisputed from the stipulation of the parties (see *supra,* pp. 6-7) that the contents of the package presented to the government chemist for analysis were heroin. In this respect, the instant case is distinguishable from *Guilbeau* v. *United States,* 288 Fed. 731 (C.A. 5) [see Pet. 16], in which there was a substantial variance between the charge in the indictment of the unlawful sale of a particular compound and the sale of a different one.

3. Petitioner's next argument, also without sub-

[4] *United States* v. *Hammers,* 241 Fed. 542 (S.D. Fla.) from which petitioner quotes at length (Pet. 14-15) is only a district court case, and is contrary to the Court of Appeals decisions we have cited, including *James* v. *United States, supra,* a Fifth Circuit case which removes any persuasive force of *United States* v. *Hammers, supra,* although that decision is not mentioned in the *James* opinion.

stance, is that the Government failed to prove that he possessed and sold any particular amount of heroin (Pet. 18-21).

At the opening of the trial, the parties stipulated that the government chemist, if called upon to testify, would state that the package given to him by agent Fields for chemical analysis, being Government Exhibit 1, contained heroin (see *supra*, pp. 6-7). At the conclusion of the oral argument, when the court asked whether "there are something like 100 grains of heroin there," the government attorney replied, without objection by petitioner's counsel, "112, your Honor" (*supra*, p. 7). Again, at the hearing before sentencing, when the Court remarked, "This is a heroin case?", the government attorney stated, with no objection being interposed by petitioner's counsel, "Yes, 112 grains, one-quarter ounce" (*supra*, p. 8). The court below held that, by reason of the foregoing, in an informal trial without a jury, "it was stipulated in effect that Exhibit 1 contained 112 grains of heroin" (R. 61, 63).[5]

In any event, the amount sold is significant only to the extent that petitioner tries to bring his case under 26 U.S.C. 2551(a), which provides that the pertinent narcotics statutes "shall not be construed to apply to the * * * sale * * * or possession of preparations and remedies which do not

[5] Several times in Richards' testimony he referred to the heroin he was to purchase from petitioner as a "quarter ounce" and a "quarter piece" (R. 8, 16, 18).

contain more than * * * one-eighth of a grain of heroin * * * *Provided,* That such remedies and preparations are manufactured, sold, distributed, given away, dispensed or possessed as medicines * * *." As the court below pointed out, "the size of the package was a physical exhibit before the trial judge" and "112 grains was 896 times greater in weight than the 1/8 grain permitted under the statute" (R. 63). The trial court, therefore, had before it ample evidence that petitioner sold more than 1/8 of a grain of heroin. Petitioner, who denied that he possessed or sold any heroin (R. 26-37), made no showing that he was using a heroin preparation as medicine and did not meet the burden of proof of showing that he came within the exemption.[6] The Government thus proved its case by showing the possession and sale of some heroin without proving a specific quantity.

4. Finally, there is no merit in petitioner's contention that the court did not make a valid finding of guilty to support his sentence. The argument is that the "finding of guilty on both counts" (R. 44) by the court was invalid, and that this erroneous finding was never corrected. (Pet. 21-24.)

It is true that at the hearing on June 26, 1950, the trial court stated that there would be "a finding of guilty on both counts" and did not correct this

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[6] See *Rossi* v. *United States*, 289 U.S. 89, 90-92; *McKelvey* v. *United States*, 260 U.S. 353, 356-357; *7 Fifths Old Grand-dad Whiskey* v. *United States*, 158 F. 2d 34, 36 (C.A. 10), certiorari denied, 330 U.S. 828.

during the colloquy which followed (R. 44). However, in a written order on the same day the court found the "defendant guilty as charged in the Indictment filed herein against him" (R. 47), indicating that there was a finding of guilty on all three counts. Although petitioner is correct in saying that this order, as it appears in the printed record, is not signed by the court (see Pet. 23-24), the order of June 29, 1950, imposing sentence upon petitioner, is signed by the court (R. 50), and states that the court had "found [petitioner] guilty as charged in the Indictment filed herein against him" (R. 49). Therefore, it is clear that the trial court did make a finding of guilty on all three counts "as charged in the Indictment." The court made its original finding of guilty (R. 44) and imposed its sentence (R. 46, 49-50) in the presence of petitioner in accordance with Rule 43, F.R. Crim. P.

Even assuming, *arguendo,* as petitioner states (see Pet. 21-22), that the only finding which the court made was "guilty on both counts" (R. 44), he has shown no prejudicial or reversible error. If "both counts" be construed as referring to counts 1 and 2, 1 and 3, or 2 and 3, and the conviction under count 1 is invalid as held by the court below, the general sentence of two years, being less than might have been imposed under either count 2 or 3, was valid. See *Pinkerton* v. *United States,* 328 U.S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States,* 320 U.S. 81, 85; *Abrams* v. *United States,*

250 U.S. 616, 619; *United States* v. *Hornstein*, 176 F. 2d 217, 218-219 (C.A. 7); *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 19 (C.A. 7), certiorari denied, 337 U.S. 959; *United States* v. *Perplies*, 165 F. 2d 874, 877 (C.A. 7).

CONCLUSION

The case below was correctly decided, and no question of importance is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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